No. 36799-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

8 21 54-2

STATE OF WASHINGTON

V.

CHRISTOPHER SIEYES

SUPPLEMENTAL BRIEF

Thomas E. Weaver
WSBA #22488
Attorney for Appellant

The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

A. Supplemental Assignment of Error

Assignment of Error

RCW 9.41.040(2)(a)(iii) is unconstitutional because it creates an absolute prohibition on minors possessing firearms in violation of their Second Amendment rights.

Issue Pertaining to Assignment of Error

Should this Court sustain the constitutionality of RCW 9.41.040(2)(a)(iii), which creates an absolute prohibition on minors possessing firearms in violation of their Second Amendment rights?

B. Statement of Facts

On February 7, 2008, Appellant Christopher Sieyes filed his Brief of Appellant which raised numerous assignments of errors. On April 26, 2007, Mr. Sieyes, who was 17 and 4 months old, was seated in the front passenger seat of a car that was stopped for speeding. Eventually, a handgun was found under the front passenger seat. He was convicted of violating RCW 9.41.040(2)(a)(iii), which prohibits minors from possessing firearms. Among the issues presented was the constitutionality of RCW 9.41.040(2)(a)(iii), which creates an absolute prohibition on minors possessing firearms.

Mr. Sieyes argued that an absolute prohibition violates his Second Amendment rights under the United States Constitution as well as his rights under Article 1, section 24 of the Washington Constitution. In his brief, he briefly mentioned that the United States Supreme Court was in the process of reviewing the scope of the Second Amendment in the case of United States v. Heller, 128 S,Ct. 2783, 171 L.Ed.2d 637 (2008). The Heller decision was decided on June 26, 2008. On July 29, 2008, this Court ordered supplemental briefing on the applicability of the Heller decision.

C. Argument

RCW 9.41.040(2)(a)(iii) creates an absolute prohibition on minors possessing firearms. The Heller decision made clear that absolute prohibitions are unconstitutional under the Second Amendment when it said, "[H]andguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." Heller at 680. Under this analysis, RCW 9.41.040(2)(a)(iii) is unconstitutional and Mr. Sieyes' conviction must be reversed and dismissed.

Before reaching the merits of Mr. Sieyes' argument, it is helpful to point out what is not at issue in his case. Mr. Sieyes argues that RCW

9.41.040(2)(a)(iii) is facially invalid as an absolute prohibition on his right to possess a firearm. He does not dispute the right of the State to impose reasonable time, place, and circumstance restrictions on his firearm rights. He, therefore, proffers no opinion on whether he could have been properly charged and convicted of numerous other criminal statutes.[1]

1. RCW 9.41.040(2)(a)(iii) is an absolute prohibition of firearm possession by minors.

RCW 9.41.040(2)(a)(iii) simply states that it is illegal for any person under the age of 18 to possess a firearm, except as permitted by RCW 9.40.042. RCW 9.40.042 contains nine exceptions to this absolute prohibition.

The State argues that RCW 9.41.040(2)(a)(iii) is not an absolute prohibition because juveniles may still possess firearms in nine circumstances. Supp. Brief of Resp. at 4. There are two ways to read the nine exceptions of RCW 9.40.042: (1) they create affirmative defenses which must be proved by the defendant; or (2) they constitute elements of the crime that must be disproved by the State. In Mr. Sieyes' trial, the trial

---

[1] RCW 9.41.050 prohibits carrying a concealed weapon in a vehicle without a concealed weapons license. RCW 77.15.460 prohibits possessing a loaded firearm in a vehicle. The reasonableness of these statutes and others like them, which purport to restrict the time, place, and circumstances under which a person may lawfully carry a firearm is an issue best left to another day.

court treated the exceptions as affirmative defenses. On appeal, the State continues to argue that the exceptions are affirmative defenses that must be proved by the defendant. In the State's Brief of Respondent, the State argues, "None of the exceptions constitute an element of the offense." Brief of Resp. at 12.

When a statute prohibits certain activity, but creates exceptions which must be proved by the defendant, then an absolute prohibition has been created. In State v. Robbins, 138 Wn.2d 486, 980 P.2d 725 (1999), the Court held that the recently amended DUI statute creates an absolute prohibition on having an alcohol concentration on .10 or more within two hours of driving. The fact that the defendant has the opportunity to prove he or she had drank after driving created a defense that did not need to be pled or proved by the State in its case-in-chief. Similarly, the exceptions to the absolute prohibition on underage drinking have been interpreted as creating affirmative defenses. State v. Lawson, 37 Wn. App. 539, 681 P.2d 867 (1984).

In Heller, the statutes at issue also had some exceptions similar to the exceptions set out in RCW 9.41.042, such as possession for "lawful recreational firearm-related activit[ies]" and transport to and from such activities. See D. C. Code §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4). The Supreme Court dismissed these exceptions

perfunctorily in footnote 1 and had no difficulty concluding that the statute creates an absolute prohibition on firearm possession.

The second way to read the statute is that it creates a partial prohibition on firearm possession by minors with exceptions that must be disproved by the State. There is some precedent for such a reading of the statute. When a strict reading of a statute infringes on a constitutional right, courts will sometimes place a limiting construction on the statute in order to save its constitutionality. In State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006) the Supreme Court required that the jury be instructed that threats to bomb must constitute a "true threat." This construction was necessary in order to avoid the statute running afoul of the First Amendment.

Mr. Sieyes' position is that the more logical way to read RCW 9.41.040(2)(a)(iii) is as an absolute prohibition. That is the most natural way to read the statute and is consistent with how the trial court read it and how the State reads it. Should this Court conclude, however, that RCW 9.41.040(2)(a)(iii) does not create an absolute prohibition but can be saved with a limiting construction, there remains the issue that the trial court did not apply the correct burden of proof. There was no effort by the trial court to require the State to apply the exceptions of RCW 9.41.042. At a

minimum, remand to the trial court for a new trial in order for the correct burden of proof to be applied is necessary.

2. Any statute that creates an absolute prohibition on firearms violates the Second Amendment.

Because RCW 9.41.040(2)(a)(iii) creates an absolute prohibition on firearm possession by minors and absolute prohibitions are unconstitutional under the Second Amendment, the remaining issue is whether the fact that Mr. Sieyes is a minor changes the analysis. As the State argues, all constitutional rights, including the Second Amendment, are subject to reasonable regulation. The State then argues that 9.41.040(2)(a)(iii) is no more than reasonable regulation of firearm possession by minors. This argument is flawed for two reasons.

First, the type of regulation the Supreme Court was discussing is time, place, and circumstance restrictions. In discussing the constitutionality of the District of Columbia's absolute prohibition on firearm ownership, the Court cited with approval an early Tennessee case, saying, "In Andrews v. State, the Tennessee Supreme Court likewise held that a statute that forbade openly carrying a pistol 'publicly or privately without regard to the time place, or circumstances,' violated the state constitutional provision (which the court equated with the Second

Amendment)." Heller at 678-80, citing Andrews v. State, 50 Tenn. 165 (1871). The Heller Court explicitly approved certain time, place and circumstance restrictions on firearm possession, including firearm prohibitions by convicted felons and handgun registration requirements, as long as the registration process is "not enforced in an arbitrary and capricious manner." Heller at 681.

The second reason the State's argument is flawed is that the right to bear arms is an individual right possessed by all citizens, including minors. As Justice Scalia stated in his majority decision in Heller, "We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans." Heller at 651. Any restriction on this individual right to possess a firearm must, therefore, be viewed with suspicion.

There are three times when the issue of firearms and minors are discussed in the majority decision. The first time is when Justice Scalia is discussing the use of the word "militia" as contained in the preamble to the Second Amendment. In order to assist him in defining the word "militia" as it was used in 1791, he noted that the First Congress passed an act in 1792 which required every "able bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, or over the age of forty-five years" to be enrolled in the militia.

Heller at 660. But Justice Scalia was quick to point out that the requirement that all white males between 18 and 45 be enrolled in the militia did not constitute the "entire body" of the militia, but instead represented a "subset of them." Heller at 660. Therefore, just as a white male previously enrolled in the militia did not suddenly lose his right to bear arms upon reaching the age of 46, so also a 17 year old did not suddenly gain the right to bear arms on his eighteenth birthday. The right to bear arms vests in all "the people," regardless of age.

This point is made most forcefully in the decision's second reference to age. Justice Scalia was referencing early interpretations of the Second Amendment and cites approvingly to the decision of Nunn v. State, 1 Ga. 243 (1846). In Nunn, as quoted by the Heller majority, the Georgia Supreme Court struck down a ban on carrying pistols openly, saying:

> The right of the whole people, *old and young*, men, women and *boys*, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State. Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this right, originally belonging to our forefathers, trampled under foot by Charles I. and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the

> colonists, and finally incorporated conspicuously in our own Magna Charta!

Heller at 669-70 (emphasis added). The Georgia Supreme Court unequivocally recognized the right of young boys to bear arms.

The third and final reference to age in the Heller decision references the right of fathers to teach their sons to keep guns and pistols in a safe manner. Heller at 673, citing B. Abbott, Judge and Jury: A Popular Explanation of the Leading Topics in the Law of the Land 333 (1880). Taking these three age references together, this Court should conclude that the Second Amendment forbids absolute prohibitions on firearm possession by minors.

The overall structure of the Heller decision also supports the position that absolute prohibitions on firearms by minors are unconstitutional. The Court repeatedly juxtaposes the Second Amendment to its constitutional neighbor, the First Amendment. The majority references First Amendment jurisprudence at least ten times, and Justice Stevens, writing the primary dissent, references the First Amendment another six times. In a typical example, Justice Scalia makes the point that absolute prohibitions on the right to free speech are unconstitutional while time, place, and circumstance restrictions may not be. Writing for the majority, he says, "There seems to us no doubt, on the

basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not." Heller at 659.

Although the Supreme Court has recognized more time, place, and circumstance restrictions on a minor's right to free speech, it is well settled that minors have First Amendment rights and that any absolute prohibition on such rights is unconstitutional. In Morse v. Frederick, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007), the Court said that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Morse at 296, citing Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). While such rights, as is the case of all rights, are subject to reasonable regulation, the fact that a person may be a minor does not preclude the recognition of First Amendment rights.

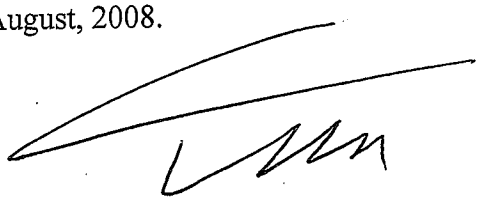
In sum, RCW 9.41.040(2)(a)(iii) is an absolute prohibition on firearm possession by minors and such absolute prohibitions are unconstitutional under the Second Amendment. While a person's age may prompt the legislature to enact reasonable time, place, and circumstance restrictions in the future consistent with the Heller decision, RCW

9.41.040(2)(a)(iii) as it currently exists is unconstitutional and Mr. Sieyes' conviction must be reversed.

D. Conclusion

This Court should reverse and dismiss Mr. Sieyes' conviction.

DATED this 15th day of August, 2008.



Thomas E. Weaver, WSBA #22488
Attorney for Defendant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. CHRISTOPHER SIEYES, Defendant.	Case No.: 07-8-00353-7 Court of Appeals No.: 36799-8-II AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

THOMAS E. WEAVER, being first duly sworn on oath, does depose and state:

I am a resident of Kitsap County, am of legal age, not a party to the above-entitled action, and competent to be a witness.

On August 15, 2008, I sent an original and a copy, postage prepaid, of the SUPPLEMENTAL BRIEF OF APPELLANT, to the Washington State Court of Appeals, Division Two, 950 Broadway, Suite 300, Tacoma, WA 98402.

The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

ORIGINAL

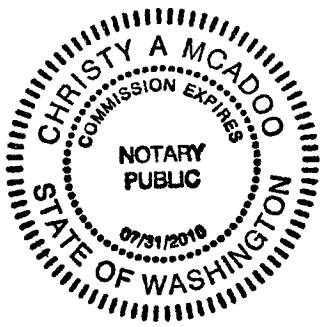
On August 15, 2008, I sent a copy, postage prepaid, of the SUPPLEMENTAL BRIEF OF APPELLANT, to the Kitsap County Prosecutor's Office, 614 Division St., MSC 35, Port Orchard, WA 98366-4683.

On August 15, 2008, I sent a copy, postage prepaid, of the SUPPLEMENTAL BRIEF OF APPELLANT, to Mr. Christopher Sieyes, 3664 S.E. Kowalski Lane, Port Orchard, WA 98367.

Dated this 15th day August, 2008.

Thomas E. Weaver
WSBA #22488
Attorney for Defendant

SUBSCRIBED AND SWORN to before me this 15th day of August, 2008.



Christy A. McAdoo
NOTARY PUBLIC in and for
the State of Washington.
My commission expires: 07/31/2010

The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345